NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK
MAR 12 2013
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

JOAN TOBER, Plaintiff/Appellant, v. CIVANO 1: NEIGHBORHOOD ASSOCIATION, INC., an Arizona nonprofit corporation; and RICK HANSON, MARK LEVINE, GEORGE LUIS, LEE RAYBURN, BOB SMALL, CHRIS SHIPLEY, and LES SHIPLEY, Defendants/Appellees.	2 CA-CV 2012-0129 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20113384

Honorable Scott Rash, Judge

AFFIRMED

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E S P I N O S A, Judge.

¶1 Joan Tober appeals the entry of summary judgment in favor of Civano 1: Neighborhood Association, Inc. ("Civano") and members of its board of directors (collectively, "the board") on her claim of breach of statutory obligation. She challenges the annual election held in 2011, asserting the board was required to allow members to vote in person and by absentee ballot, instead of exclusively by mail-in ballot, citing A.R.S. § 33-1812(A). For the following reasons, we affirm the trial court's summary-judgment ruling.

Factual Background and Procedural History

¶2 Civano, a nonprofit corporation, manages a planned community in Tucson and holds annual elections of its board of directors.[1] Tober is a mandatory member of Civano by virtue of owning property within the community. Her allegations arise from the 2011 Civano board-of-directors election.

¶3 On March 1, the board sent election ballots to all members, with a formal notice of the annual membership meeting, ballot instructions, and the election timeline. Members were advised to return the ballots by mail or hand delivery to Civano's office by March 21 at five o'clock p.m. On March 15, the board adopted an administrative

[1]Section 33-1802(4), A.R.S., defines a planned community as "a real estate development owned and operated by a nonprofit corporation . . . created for the purpose of managing, maintaining or improving the property and in which the owners of separately owned lots . . . are mandatory members and are required to pay assessments to the association for these purposes."

resolution applicable to the 2011 election to authorize, apparently exclusively, the use of written mail-in ballots to elect board members. In conformity with the election timeline, the Civano election committee counted all ballots on March 21 and certified the results to the board. At the annual meeting the next day, the results were announced. Tober mailed her ballot to Civano, attended the annual meeting, and does not contend her ballot was not counted.

¶4 Over a month after the election was finalized, Tober brought an action against Civano and the board members, alleging breach of contract, breach of fiduciary duty, and breach of statutory obligation arising from, *inter alia*, the mail-in ballot procedure. Tober amended her complaint to add several requests for injunctive relief pursuant to A.R.S. § 10-3304: to force the board to conduct elections in accordance with § 33-1812, to mandate the board conduct annual elections at the annual meeting, and to enjoin the board from amending the community documents election procedures pending resolution of the dispute. She also included a claim for election tampering, but does not pursue that claim on appeal. She withdrew her breach-of-contract and breach-of-fiduciary-duty claims after conceding she had suffered no individual damages, she had not been disenfranchised by the board's actions, and the election results would have been the same absent the board's bylaw violations.

¶5 Following a hearing on the parties' cross-motions for summary judgment, the trial court determined the ballot provisions in the Arizona Nonprofit Corporation Act,

see A.R.S. § 10-3708,[2] and the planned communities statutes, *see* § 33-1812,[3] were not inconsistent and did not prohibit the board from holding elections exclusively by mail-in ballot in advance of the annual meeting. The parties agreed those findings effectively disposed of Tober's statutory claim, and the court issued a final judgment in favor of Civano and the board, including an award of attorney fees and costs.[4] *See* A.R.S. §§ 12-341, 12-341.01; *see also* Ariz. R. Civ. P. 54(b). On appeal, Tober challenges only

[2]Section 10-3708(A) provides:

> Unless prohibited or limited by the articles of incorporation or bylaws, any action that [a nonprofit] corporation may take at any annual, regular or special meeting of members may be taken without a meeting if the corporation delivers a written ballot to every member entitled to vote on the matter.

[3]Section 33-1812(A) states:

> Notwithstanding any provision in the [planned] community documents, . . . votes . . . may not be cast pursuant to a proxy. The association shall provide for votes to be cast in person and by absentee ballot and may provide for voting by some other form of delivery. Notwithstanding § 10-3708 or the provisions of the community documents, any action taken at an annual, regular or special meeting of the members shall comply with [certain procedural requirements] if absentee ballots are used . . . .

[4]Tober has failed to include a transcript of any proceeding as required by Rule 11(b), Ariz. R. Civ. App. P.; we therefore assume those proceedings would support the trial court's findings and conclusions. *See Baker v. Baker*, 183 Ariz. 70, 73, 900 P.2d 764, 767 (App. 1995). Given that assumption, we cannot determine the grounds for the court's dismissal of Tober's statutory claim but will affirm the trial court if its ruling is correct for any reason apparent in the limited record. *See Forszt v. Rodriguez*, 212 Ariz. 263, ¶ 9, 130 P.3d 538, 540 (App. 2006).

the entry of judgment on her claim of breach of statutory duty. We have jurisdiction over her appeal pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1).

Discussion

¶6 Tober asserts the trial court erred in determining she lacked standing to sue for breach of statutory obligation under § 33-1812 unless she brought her claims in the form of a derivative action, reasoning that the community documents and § 10-3304 grant her standing.[5] "In reviewing a summary judgment in a case involving undisputed material facts, we independently review the trial court's application of the law to the facts." *Vales v. Kings Hill Condo. Ass'n*, 211 Ariz. 561, ¶ 9, 125 P.3d 381, 384 (App. 2005), *abrogated on other grounds by Powell v. Washburn*, 211 Ariz. 553, 125 P.3d 373 (2006). Capacity to sue is a question of law reviewed *de novo*. *Gemstar Ltd. v. Ernst & Young*, 185 Ariz. 493, 499, 917 P.2d 222, 228 (1996).

Standing to Assert Statutory Claim against Board of Directors

¶7 As for Tober's claim against the board,[6] an action brought by an association member is derivative "'if the gravamen of the complaint is injury to the corporation, or to the whole body of its stock or property without any severance or distribution among individual holders.'" *Albers v. Edelson Tech. Partners L.P.*, 201 Ariz. 47, ¶ 17, 31 P.3d 821, 826 (App. 2001), *quoting Funk v. Spalding*, 74 Ariz. 219, 223, 246 P.2d 184, 186

[5]Section 33-1812 does not provide for a private cause of action.

[6]Although Tober did not specifically name the board as a defendant within her claim for breach of statutory obligation, that claim incorporated all "foregoing allegations" in her complaint, including that the board had conducted the election outside its statutory authority and in violation of §§ 10-3708 and 33-1812. Additionally, Tober requested relief in the form of injunctions against the board.

(1952). A derivative lawsuit may be brought only if a member meets certain standing requirements and follows a statutorily defined demand process. A.R.S. §§ 10-3631, 10-3632. But a member may bring a direct action against an alleged wrongdoer without following the derivative lawsuit procedures if (1) the member has a relationship with the alleged wrongdoer, in this case the board, apart from the member's interest in the association, (2) the wrongdoer owes a duty to the member for a reason other than membership status, or (3) the injuries or damages sustained are unique to the individual member and not the association. *See Albers*, 201 Ariz. 47, ¶ 18, 31 P.3d at 826. The derivative lawsuit statutory provisions contained in §§ 10-3631 and 10-3632 govern member lawsuits against nonprofit planned community boards of directors because there is no conflict between the two bodies of law with respect to derivative lawsuit limitations. *See* Restatement (Third) of Property (Servitudes) § 6.13 cmt. a (2000) (in event of conflict between servitudes law and law applicable to association form, servitudes law controls).

¶8 Tober lacks capacity to sue the board by bringing a direct action. She claims no special relationship with the board, alleges no individual injury, and does not assert the board owed her a duty for any reason other than her membership status. Instead, Tober merely asserts that she sued based on a "personal stake in how her community is run." The gravamen of her claim of breach of statutory obligation is that Civano members as a whole were disadvantaged by the mail-in ballot procedures; thus, the action is derivative. Moreover, a member lawsuit against the board is not authorized by either the community documents or by § 10-3304, which permits member lawsuits

against planned community associations. *See Ariz. Biltmore Estates Ass'n v. Tezak*, 177 Ariz. 447, 448, 868 P.2d 1030, 1031 (App. 1993) (planned community documents constitute contract between members and subdivision owners as a whole); *see also Johnson v. Pointe Cmty. Ass'n*, 205 Ariz. 485, ¶¶ 23-24, 73 P.3d 616, 620-21 (App. 2003) (planned community association must comply with planned community documents). Consequently, because Tober failed to follow the derivative-lawsuit procedures to bring her claim of breach of statutory obligation against the board, the trial court properly dismissed it.

Civano's Declaration of Covenants, Conditions, and Restrictions

¶9 As to her allegations against Civano, Tober contends her statutory claim was authorized by the Declaration of Covenants, Conditions, and Restrictions ("CC&Rs"),[7] which comprises a contract between Civano and its members. *See Ariz. Biltmore Estates Ass'n*, 177 Ariz. at 448, 868 P.2d at 1031. The interpretation of a restrictive declaration is generally a question of law that we review *de novo*, giving effect to the "plain intent and purpose" of the parties as determined from the language used in the instrument. *Powell*, 211 Ariz. 553, ¶¶ 8, 13, 18, 125 P.3d at 375-76, 377, 378. According to § 16.1 of the CC&Rs, "Each Owner . . . has the right and authority, but not the obligation, to enforce the provisions of [the CC&Rs]." The plain language of § 16.1 provides a cause of action to Civano members to enforce community governing

[7]By its nature, a derivative lawsuit generally cannot involve a member suing her own community association. *See* § 10-3631(A) (derivative lawsuit brought on behalf of corporation to procure judgment in favor of corporation).

documents. But Tober concedes the breach-of-statutory-obligation claim was "independent of the contract between the parties," "neither intrinsic to nor dependent upon the existence of the contract." And § 33-1812 could not be deemed part of the CC&Rs because it was not in effect when the CC&Rs were executed. *See Higginbottom v. State*, 203 Ariz. 139, ¶ 11, 51 P.3d 972, 975 (App. 2002) (contract incorporates statutes in force when contract formed); *see also* 2005 Ariz. Sess. Laws, ch. 269, § 8 (enacting § 33-1812). Thus, the CC&Rs do not authorize Tober's statutorily based action because it was not brought to enforce the community documents.

A.R.S. § 10-3304

¶10 Tober nevertheless asserts she may bring a claim against Civano under § 10-3304 to enforce the provisions of § 33-1812. "[W]e review the interpretation and application of statutes de novo," *Vales*, 211 Ariz. 561, ¶ 9, 125 P.3d at 384, and seek to determine and effectuate the legislative intent behind the statute. *Cypress on Sunland Homeowners Ass'n v. Orlandini*, 227 Ariz. 288, ¶ 30, 257 P.3d 1168, 1177 (App. 2011). "If the language is plain and unambiguous, then no construction is necessary and our duty is simply to apply that plain and unambiguous language . . . [and a] review of legislative history is neither necessary nor appropriate." *In re Adam P.*, 201 Ariz. 289, ¶¶ 12-13, 34 P.3d 398, 400 (App. 2001).

¶11 Section 10-3304 states that "the validity of corporate action shall not be challenged on the ground that the corporation lacks or lacked power to act," except that "[a] corporation's power to act may be challenged . . . [i]n a proceeding by any member of . . . a planned community association against the corporation to enjoin the act pursuant

to [an injunction]." § 10-3304(A), (B)(3). Tober, a member of Civano, a planned community association, challenged Civano's authority to conduct the 2011 election and any future election exclusively by mail-in ballot. *See* § 33-1812. This amounted to a claim questioning the validity of Civano's actions. Tober's generalized complaint did not specify which "act" she challenged in her § 10-3304 claim, but we assume she challenged Civano's election process and that the statute's broad terms would encompass that "act." Thus, contrary to Civano's position on appeal that this is not the type of act contemplated by § 10-3304, we agree with Tober that she could bring a claim for injunctive relief to "enjoin the act." § 10-3304(B).

¶12 We therefore turn to whether Tober was entitled to injunctive relief against Civano. As for the 2011 election, because Tober did not seek to enjoin the 2011 election procedure before the election was finalized, she could not later challenge the election on the ground that Civano had lacked the power to act. *See Modular Mining Sys., Inc. v. Jigsaw Techs., Inc.*, 221 Ariz. 515, ¶ 12, 212 P.3d 853, 857 (App. 2009) (injunctive relief only available for likely future conduct); *cf. Zajac v. City of Casa Grande*, 209 Ariz. 357, ¶ 14, 102 P.3d 297, 300 (2004) ("[I]f parties allow an election to proceed in violation of the law which prescribes the manner in which it shall be held, they may not, after the people have voted, then question the procedure."), *quoting Kerby v. Griffin*, 48 Ariz. 434, 444, 62 P.2d 1131, 1135 (1936) (alteration in *Zajac*). Her proper course of action was to have sought an injunction in the first instance. She failed to do so, and waited over a month to bring any claim contesting the election procedure, and over five months to add a reference to § 10-3304 in her complaint. Because the two-year terms of the three

directors re-elected in 2011 have nearly ended, it is now impracticable for her to seek to enjoin that election.

¶13 Neither was Tober entitled to an injunction to influence Civano's post-2011 elections. Her complaint for breach of statutory obligation alleged generally, "[Civano] breached the statutory obligations to the Homeowner imposed on it under A.R.S. §[ ]33-1812." And only in her prayer for relief did Tober request an order "declaring that the Homeowner is entitled to injunctive relief pursuant to A.R.S. § 10-3304 as follows[:] . . . enjoining the Board from conducting association elections pursuant to A.R.S. § 10-3708 [and] enjoining the Board from refusing to conduct the annual election in accordance with A.R.S. § 33-1812." *Cf. McClanahan v. Cochise Coll.*, 25 Ariz. App. 13, 17, 540 P.2d 744, 748 (1975) ("In considering the sufficiency of a complaint to state a claim for relief, the prayer is not part of the complaint."). Tober's complaint did not assert the elements to support an injunction, including that the relief to which she was entitled required the restraint of some act prejudicial to her, that Civano had threatened some future act in violation of her rights which would tend to render judgment ineffectual, or that she was entitled to an injunction under principles of equity. *See* A.R.S. § 12-1801.

¶14 Although Tober generally sought to disallow the board from conducting future elections pursuant to the procedures followed in 2011,[8] the record does not reflect

[8]Tober's complaint sought numerous injunctions to, *inter alia*, force the board to conduct the election in accordance with §§ 33-1812 and 10-3804, prohibit it from following § 10-3708, and mandate that the board conduct the annual election during the annual meeting.

any claim or argument to the trial court of any specific risk future elections would violate § 33-1812 in abrogation of her membership or voting rights. Consequently, she did not demonstrate a justiciable controversy. *Cf. Citizens' Comm. for Recall of Jack Williams v. Marston*, 109 Ariz. 188, 192, 507 P.2d 113, 117 (1973) (where no indication election officials will fail to abide by election statute, no cause for declaratory relief). At oral argument before this court, Tober pointed to the board's 2011 administrative resolution, and claimed that document demonstrates a likelihood Civano would violate § 33-1812 in future elections. The resolution declared, "In accordance with Section 5.2.2 of the Bylaws and with A.R.S. [§] 10-3708, the use of written mail-in ballots is authorized to conduct the annual election to fill expiring terms on the Board." But apart from attaching this document to her statement of facts, there is, again, no indication in the record that she made this argument to the trial court. *See Harris v. Cochise Health Sys.*, 215 Ariz. 344, ¶ 17, 160 P.3d 223, 228 (App. 2007) (argument not raised below waived on appeal).

¶15 In any event, Tober could not maintain an injunctive action absent a showing she was likely to be harmed by Civano's future conduct. *See* § 12-1801 (writ of injunction granted where "act prejudicial to the applicant" or "in violation of the rights of the applicant"). Tober asserted at oral argument that a general "deprivation of rights" guaranteed under the Arizona planned communities act could qualify as probable future injury and claimed, "The complaint is that the plaintiff/appellant has been denied her right to transparency in the governance and election in her homeowners association by virtue of the board's refusing to conduct the election in the meeting." But she cited no authority for her position and we have been unable to find any beyond the analogous

context of state and local election contests, where the right to vote is statutorily protected and the legislature has provided grounds for injunctive relief. *See* A.R.S. §§ 16-672, 16-674; *Chavez v. Brewer*, 222 Ariz. 309, ¶ 28, 214 P.3d 397, 406 (App. 2009) (construing voting-machine statutes as providing private cause of action for enforcement). However, Tober was not denied her right to vote.

¶16 Because there is no evidence that Civano would violate her membership rights in a future election, and Tober's arguments were based only on the 2011 election, her attempted enjoinder of future speculative actions was not justiciable. Tober clarified in her opposition to summary judgment that she "does not ask that the Court interfere in Civano's election process. Only that it declare the various actions of the Defendants [in the 2011 election] to be . . . in violation of the applicable statutes in order that future elections are conducted properly and Members are given their Annual Meeting." Courts do not take jurisdiction of such actions. *See Planned Parenthood Ctr. of Tucson, Inc. v. Marks*, 17 Ariz. App. 308, 310, 497 P.2d 534, 536 (1972) (declaratory relief must be "based on an actual controversy which must be real and not theoretical"); *see, e.g.*, *Merrick v. Rottman*, 135 Ariz. 594, 599, 663 P.2d 586, 591 (App. 1983) ("[Appellant] requested injunctive relief to enjoin the Board from taking future action . . . . Since no further action by the Board is contemplated, this request for relief is, at the present time, premature."). "A declaratory judgment proceeding to obtain an advisory judgment or to answer a moot or abstract question will not lie." *Manning v. Reilly*, 2 Ariz. App. 310, 314, 408 P.2d 414, 418 (1965). Thus, the requested injunctions were insufficient to state a claim for relief and judgment was properly entered against her.

¶17 In any event, even had Tober demonstrated sufficient potential harm, we do not find that § 33-1812 prohibited Civano from conducting the election by mail and counting the ballots prior to the annual meeting. "We interpret statutory language to give effect to each word of the statute, such that 'no clause, sentence or word is rendered superfluous, void, contradictory or insignificant.'" *State ex rel. Dep't of Econ. Sec. v. Hayden*, 210 Ariz. 522, ¶ 7, 115 P.3d 116, 117 (2005), *quoting Bilke v. State*, 206 Ariz. 462, ¶ 11, 80 P.3d 269, 271 (2003). Statutes that relate to the same matter are construed together. *Id.* Tober asserts the plain language of § 33-1812(A), "The association shall provide for votes to be cast in person and by absentee ballot," requires Civano to provide in-person voting for all elections. But the plain language of the same subsection, which reads "*if* absentee ballots are used," indicates the use of absentee ballots at a meeting involving the members is optional; we therefore disagree with Tober's assertion that both voting methods are required at every election. § 33-1812(A) (emphasis added). Additionally, the statute permits an association to provide for voting by "some other form of delivery," such as mail-in ballot. *Id.* And § 33-1812 does not mandate that voting occur at an annual meeting, just as A.R.S. § 33-1804, the planned communities open meeting law, does not require that all elections occur at an open meeting, only that all meetings be open to all members of the association.

¶18 Finally, we disagree with Tober's assertion that § 33-1812 requires in-person voting "notwithstanding any provision in the community documents." The phrase "notwithstanding" appears only in the context of proxy-voting provisions and absentee-ballot formatting requirements and does not apply to voting methods chosen by

an association. *See Estate of Braden ex rel. Gabaldon v. State*, 228 Ariz. 323, ¶ 13, 266 P.3d 349, 352 (2011) (statutory term interpreted in context of accompanying words). In sum, we find no error in the trial court's determination that Civano's mail-in ballot procedure, conducted prior to its annual meeting, did not violate § 33-1812.

Attorney Fees

¶19 Tober challenges the trial court's award of Civano's and the board's attorney fees pursuant to § 12-341.01 and § 16.2 of the CC&Rs. We review the court's decision for an abuse of discretion. *Vicari v. Lake Havasu City*, 222 Ariz. 218, ¶ 23, 213 P.3d 367, 373 (App. 2009). Section 12-341.01 permits an award of attorney fees to a "successful party" in an "action arising out of a contract," and § 16.2 provides, "In the event any legal action is instituted to enforce the provisions of this Declaration, the successful party shall be entitled to judgment against the other party for all attorney's fees and court costs incurred." Tober asserts there was no basis for a fee award under contract because no claims "arising out of a contract" remained after she withdrew her contract and breach-of-fiduciary-duty claims. However, voluntary dismissal of a contract action does not preclude an award of attorney fees under § 12-341.01. *Id.* ¶¶ 26-27. Tober's additional arguments that the court failed to consider certain enumerated factors and the fees award might "chill" other members from bringing suit are likewise unpersuasive because we assume the court's discretionary award is supported by the absent transcripts. *See Baker*, 183 Ariz. at 73, 900 P.2d at 767. Because Civano and the board were the successful parties on all counts, we find no abuse of discretion in the court's fees award.

Disposition

¶20 For the foregoing reasons, the judgment of the trial court is affirmed. Civano and the board have requested their costs of appeal; because they are prevailing parties, we award them contingent upon compliance with Rule 21, Ariz. R. Civ. App. P. *See* A.R.S. § 12-341. And, because the contract between Civano and Tober provides for an award of attorney fees to the prevailing party in any litigation to enforce the governing documents, an award of fees is mandatory. *Bennett v. Appaloosa Horse Club*, 201 Ariz. 372, ¶ 26, 35 P.3d 426, 432 (App. 2001). We therefore award Civano its reasonable attorney fees on appeal pursuant to the fee provision of the parties' agreement, upon compliance with Rule 21.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge